82 - 2006

No. __

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

P. TAKIS VELIOTIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTORIARI

Eugene R. Anderson*
John H. Gross
ANDERSON RUSSELL KILL &
OLICK, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700

Counsel for Petitioner

*Counsel of Record

QUESTION PRESENTED[1]

1. Whether the government can abrogate a valid contract of confidentiality reached by parties to a civil litigation, and obtain the transcript of the testimony of one of the parties that was generated only because he relied upon the confidentiality provided for under the contract.

---

1. The caption of this action contains the names of all of the parties hereto.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

P. TAKIS VELIOTIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

Petitioner P. Takis Veliotis ("Veliotis") respectfully prays that a writ of certoriari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit

(hereinafter "Second Circuit") entered on March 15, 1983.[1]

OPINIONS BELOW

The opinion and judgment below of the Second Circuit appears in the Appendix commencing at A.1. The opinion is officially reported at 702 F.2d 418 (2d Cir. 1983). The judgment denying petitioner's motion for rehearing in banc appears in the Appendix commencing at A.22.

The orders of the United States District Court for the Southern District of New York, which were affirmed by the Second Circuit, appear in the Appendix at pages A.24 through A.28. The District Court did not write an opinion. The order and oral decision of the Bank-

---

1. The Second Circuit stayed the issuance of its mandate pending decision by this Court of this petition for writ of certoriari.

ruptcy Court appear in the Appendix commencing at A.29.

JURISDICTION

The opinion and judgment of the Second Circuit of which review by this Court is sought was entered on March 15, 1983. The motion denying rehearing in banc was entered on April 29, 1983. The jurisdiction of this Court to review the judgment below exists pursuant to 28 U.S.C. § 1254(1).

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the United States Bankruptcy Court for the Southern District of New York was invoked pursuant to Bankruptcy Rule 914 by the Acting United States Attorney for the Southern District of New York on March 2, 1982 when he sought access to certain documents sealed and deposited with the

Clerk of the Bankruptcy Court, and certain documents described in a Protective Order filed in the Bankruptcy Court on June 13, 1980.

CONSTITUTIONAL PROVISION INVOLVED

U.S.C.A. Const. Amend. 5. "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

STATEMENT OF THE CASE

Mr. Veliotis, an employee of General Dynamics Corporation ("General Dynamics"), was subpoenaed by the Trustee of Frigitemp Corporation ("Frigitemp") to testify in the Frigitemp bankruptcy proceeding. Before allowing Mr. Veliotis to testify, General Dynamics' counsel entered into an out-of-court contract with the Trustee's counsel that any testimony which Mr. Veliotis gave

would be used solely in connection with the Trustee's investigation of General Dynamics' dealings with Frigitemp and not subject to disclosure to third parties, including without limitation, the Acting United States Attorney and the Grand Jury. After the agreement was reached, Mr. Veliotis testified in the proceeding. Notwithstanding the valid contract between the parties, the Acting United States Attorney subpoenaed the transcript of Mr. Veliotis' testimony for submission to a grand jury investigating his relationship with Frigitemp. The Second Circuit affirmed the district court's orders enforcing the subpoena.

PROCEEDINGS BELOW

This litigation began on March 2, 1982, when the government obtained an order to Show Cause returnable before Bankruptcy Judge Joel Lewittes of the

Southern District of New York. The government's application sought certain business records and examinations which had been sealed by Judge Lewittes in connection with the bankruptcy proceeding of Frigitemp. Included within the material sought was the examination of Mr. Veliotis. In addition to its application in the Bankruptcy Court, the government subpoenaed the same records from General Dynamics.

The disclosure of the examination of Mr. Veliotis was opposed by General Dynamics on the ground that his testimony had been given pursuant to a contract of confidentiality among the Bankruptcy Trustee, General Dynamics and Mr. Veliotis. That contract of confidentiality precluded disclosure of the transcript of Mr. Veliotis' examination to third parties , including the Acting

United States Attorney and the Grand Jury.

On September 21, 1982, Judge Lewittes rendered an oral decision in favor of the Government, which was followed by his Order dated September 29, 1982 (A.29-70). Mr. Veliotis, who had recently retired from General Dynamics, then moved in the Bankruptcy Court to intervene, and his motion was granted. The September 29 order of Judge Lewittes was appealed to the United States District Court for the Southern District of New York and was assigned to Judge Vincent L. Broderick. Mr. Veliotis then moved to stay enforcement of the September 29 Order pending appeal to the District Court and that motion was granted.

On November 12, Judge Broderick issued two orders (i) affirming the order of Judge Lewittes (A.24-26) and (ii) di-

recting General Dynamics to provide the Acting United States Attorney with a copy of the Veliotis' examination for transmittal to the Grand Jury (A.27-28). Judge Broderick did not issue an opinion.

Mr. Veliotis appealed to the Second Circuit from the November 12 orders of Judge Broderick. On November 30, the Second Circuit granted a stay of Judge Broderick's orders pending appeal, and further ordered that the appeal to the Second Circuit be expedited.

The Second Circuit affirmed the decision of the district court on March 15, 1983, and denied the petition for rehearing in banc on April 29, 1983. On May 11, 1983 the Second Circuit granted a stay of the mandate pending this petition for writ of certiorari.

REASON FOR GRANTING THE WRIT

THE GOVERNMENT SHOULD NOT BE PERMITTED TO ABROGATE A VALID CONTRACT OF CONFIDENTIALITY REACHED BY PARTIES TO A CIVIL LITIGATION AND TO OBTAIN THE TRANSCRIPT OF THE TESTIMONY OF ONE OF THE PARTIES THAT WAS GENERATED ONLY BECAUSE HE RELIED UPON THE CONFIDENTIALITY PROVIDED FOR UNDER THE CONTRACT

This case presents the important issue of whether the government can abrogate a valid contract of confidentiality reached by parties to a civil litigation, and obtain the transcript of the testimony of one of the parties that was generated only because he relied upon the confidentiality provided for under the contract.

The conflict between the observance of legitimate contractual provisions and public needs of the grand jury in a criminal investigation is neatly posed in this case. This Court has never written on the issue.

Petitioner P. Takis Veliotis testified in a civil proceeding only after a valid contract was reached between the parties that his testimony would not be made available to third parties, including the Acting United States Attorney and the Grand Jury. The contract was made in order to permit the litigants to obtain Mr. Veliotis' testimony in the civil proceeding while not forcing him to incriminate himself in the criminal proceeding. Mr. Veliotis gave testimony in reliance upon the contract.

Notwithstanding the valid contract between the parties, the government subpoenaed the transcript of Mr. Veliotis' testimony and the Second Circuit affirmed the district court's orders enforcing the subpoena.

The decision in this case is a departure from Martindell v. International Tel & Tel. Corp., 594 F.2d 291 (2d Cir.

1979), which correctly applies the requisite safeguards in resolving the issue. In Martindell, the Second Circuit denied a request by the Department of Justice ("Justice") for the transcripts of depositions which had been taken in a shareholder derivative action concerning ITT's expenditures to influence the 1970 Chilean elections. The depositions were covered by a stipulation between counsel (which had been "so ordered" by the district court) restricting their use to that action. Justice made a letter request for access to the depositions, suggesting that they might be relevant to its investigations into the foreign activities of multinational corporations and of the CIA. Justice also claimed that unless it was permitted access to the transcripts of those depositions, it might be impossible to obtain statements from the witnesses, since they might re-

ly on their Fifth Amendment privilege. The district court denied the request for access to the deposition transcripts and the Second Circuit affirmed, holding:

(a) Justice could not "insinuate" itself into a private lawsuit "simply by picking up a telephone or writing a letter"; the proper procedure would have been to issue a grand jury or trial subpoena "where the issue could be raised by motion to quash or modify the subpoena." Id. at 294.

(b) In balancing the respective interests of whether or not to permit disclosure, the Second Circuit focused on the"recognized function" which a Rule 26(c) protective order performs in facilitating the just and speedy resolution of actions by enabling witn-

esses to testify in an uninhibiting manner and in reliance upon its protections. Id. at 295. In language which was not conditioned upon the informal nature of Justice's request, the Second Circuit found that "witnesses might be expected to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." Id. at 295-96. The Second Circuit found a special interest in protecting the confidentiality of an examination given in reliance upon an agreement of confidentiality, as opposed to the interest in protecting pre-existing documents produced under such an agreement because, absent the agreement, the witness could have

"invoked his privilege [against self-incrimination] and given no testimony at all." Id. at 297, n.8. Thus, the interests of litigants in precluding Government access especially to examination transcripts was found to be substantial.

(c) The countervailing public interest in securing all relevant evidence for law enforcement purposes was found to be weak, since "'the Government as investigator has awesome powers which render unnecessary its exploitation of fruits of private litigation.'" Id. at 296, quoting GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129, 132 (S.D.N.Y. 1976). Justice had alternative means of obtaining the necessary information, such as a grand jury or trial subpoena,

coupled with an ability to confer immunity should witnesses invoke Fifth Amendment protections.

(d) Thus, after balancing the interests, the Second Circuit found:

> "[A]bsent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation. . . ."

Id. at 296.

In the case here, the Second Circuit refused to enforce the contract because (i) there was no formal protective order, (ii) Mr. Veliotis did not assert

the Fifth Amendment before the contract was made and (iii) Mr. Veliotis did not designate those portions of his testimony he wished to remain confidential.

The Second Circuit's refusal in the case here to enforce the out-of-court contract between counsel for General Dynamics and the Trustee simply because it had not been formalized in a protective order issued under Rule 26(c) is unjust because it deprives Mr. Veliotis of a contract right which he had bargained for. See GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129 (1976). Both parties to the contract treated it as a binding contract and refused to release the transcript to the government.[2] Mr. Veliotis relied upon the contract when he gave potentially incriminating testi-

---

2. Subsequent to the Second Circuit's decision, the Trustee filed a complaint containing references to Mr. Veliotis' testimony. That conduct was in violation of the stay pending this petition.

mony. There is no policy reason for allowing the government to interfere with a valid legal contract simply because the parties never formalized it in a protective order issued under Rule 26(c).

Similarly, there is no policy reason for requiring Mr. Veliotis to assert his Fifth Amendment privilege before he may rely upon a subsequent out-of-court agreement of confidentiality. See Martindell v. International Tel. and Tel. Corp., 594 F.2d 291 (2d Cir. 1979). In Martindell, the court precluded the government from obtaining protected testimony on the basis that the deponents testified in reliance upon a protective order absent which they may have refused to testify. The witnesses were not required to assert the Fifth Amendment in order to invoke the protection of the confidentiality agreement.

The record here demonstrates that Mr. Veliotis testified in reliance on the out-of-court contract. Mr. Veliotis did not testify until after the General Dynamics' attorney, acting on his behalf, had moved for a protective order and reached a contract of confidentiality with the Trustee.

Finally, the out-of-court contract covered Mr. Veliotis' entire testimony and, therefore, there was no reason for him to designate portions of his testimony as confidential. The entire transcript was confidential. See Martindell, supra.

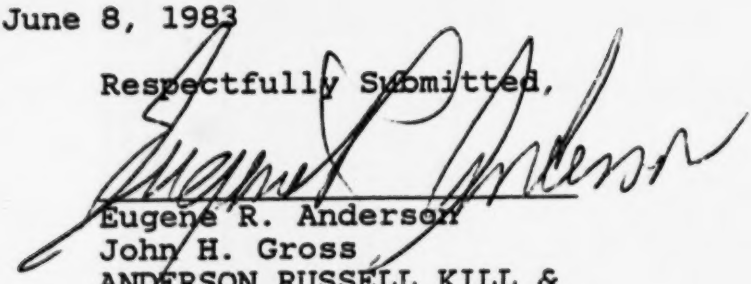
CONCLUSION

The decision below is appropriate for review by this Court for the reason stated herein, and Petitioner prays that a writ of certoriari be issued to review

the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Dated: June 8, 1983

Respectfully Submitted,



Eugene R. Anderson
John H. Gross
ANDERSON RUSSELL KILL & OLICK, P.C.
666 Third Avenue
New York, New York 10017
(212) 840-0700

Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 840 -- August Term, 1982

(Argued January 14, 1983 Decided March 15, 1983)

Docket Nos. 82-5041, 82-5043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

GEORGE C. DAVIS, IDT CORP. and GENERAL DYNAMICS,

Defendants,

GEORGE C. DAVIS and IDT CORP.,

Defendants-Appellants,

-and-

P. TAKIS VELIOTIS,

Intervenor-Appellant.

B e f o r e:

FEINBERG, Chief Judge,
CARDAMONE and DAVIS*, Circuit Judges.

---

* United States Circuit Judge, United States Court of Appeals for the Federal Circuit, sitting by designation.

Appeal from orders of the United States District Court for the Southern District of New York (Broderick, J.) which required production of testimony and documents subpoenaed by a grand jury despite claims of confidentiality.

Affirmed.

MATTHEW L. BYRNE, New York, New York (Hollman & Byrne, New York, New York of counsel), for Appellants Davis and IDT Corp.

JOHN H. GROSS, New York, New York (Anderson Russell Kill & Olick, P.C., New York, New York, of counsel), for Appellant Veliotis.

DAVID W. DENTON, Assistant United States Attorney, New York, New York (William M. Tendy, Acting United States Attorney for the Southern District of New York, Walter P. Loughlin, Assistant United States Attorney, New York, New York, of counsel), for Appellee.

CARDAMONE, Circuit Judge:

The conflict between protection of privacy interests of litigants in confidential material submitted in a civil proceeding and public needs of the grand jury in a criminal investigation is neatly posed by this appeal. Here grand jury subpoenas duces tecum seek to compel production of evidence used in a bankruptcy proceeding -- the transcript of a witness' deposition and certain corporate records. Appellants have resisted compliance, claiming that an agreement of confidentiality regarding the deposition and a settlement agreement, which placed the corporate records under a protective order and directed them sealed, shield these items from compelled production.[1]

---

1. The seal on those papers previously filed with this Court, i.e., the Government's moving papers and the responsive papers of appellants Davis, IDT and Gen-
(footnote continued)

I.

We sketch briefly the background from which this case arose. Frigitemp, a New York corporation formerly engaged in marine construction, did substantial business with General Dynamics Corporation, including subcontracting work on vessels being built by General Dynamics at its shipyards in Quincy, Massachusetts. At the time when Frigitemp was involved in this subcontracting, P. Takis Veliotis was General Manager of the General Dynamics Quincy Shipbuilding Division, and George C. Davis was serving as Senior Vice President of Frigitemp in charge of its Quincy subcontracting work. In early 1978 Davis formed a new corporation --

---

(footnote continued from previous page) eral Dynamics Corp., is to the limited extent required by this opinion lifted. A motion made by General Dynamics to keep the record before us sealed and for other relief is similarly denied to the same extent.

appellant Intersystems Design and Technology Corporation (IDT) -- and a month or so later Frigitemp filed a petition in bankruptcy in the Southern District of New York. General Dynamics promptly terminated Frigitemp's Quincy subcontracts and awarded them to IDT.

Shortly after Frigitemp filed its petition, the United States Attorney for the Southern District of New York commenced a criminal investigation into the circumstances surrounding the bankruptcy. In January 1980 Bankruptcy Judge Lewittes of the Southern District of New York authorized the trustee in bankruptcy of the Frigitemp estate to investigate causes of action available to the estate, including so-called "business crimes"[2] involving Davis, IDT and sever-

---

2. The use of the words "so-called business crimes" appearing in this record is an unfortunate euphemism. The words suggest that actions, ordinarily considered criminal, that occur in a business setting somehow are not real
(footnote continued)

al General Dynamics employees. In February 1980 the trustee, utilizing the provisions of Bankruptcy Rule 205, sought to examine General Dynamics by deposing several of its employees, including Veliotis. Because the parties were located in Quincy, ancillary proceedings were conducted before the Bankruptcy Court for the District of Massachusetts. Those to be deposed appeared by counsel who requested a protective order. After a series of hearings before Bankruptcy Judge Lavien of the District of Massachusetts, an "understanding" was reached that afforded limited protection to portions of the testimony and accompanying documents

---

(footnote continued from previous page) crimes, but merely corporate transgressions. Of course, no such distinction exists in the law. Shakespeare resolved a failure to call by name that which something is by saying: "that which we call a rose by any other name would smell as sweet." [Romeo and Juliet, Act II, scene II]. Similarly, a crime by any other name is still a crime and should be so titled.

which were later to be designated as containing confidential business information and/or scurrilous allegations of crime.

The Southern District Bankruptcy Court, in June 1980, approved a protective order which restricted the trustee's access to and use of confidential information contained in business records belonging to Davis and IDT. The trustee was only allowed to view these records in counsel's office and could not make copies. However, paragraph 9 of the order provided that "Nothing herein shall preclude IDT from disclosing any confidential information to any person or entity."

In April 1981 a settlement agreement was reached between Davis, IDT and the trustee which required IDT to pay $1.4 million to the Frigitemp estate. It also required the trustee to turn over to IDT all his copies of tran-

scripts of the examinations taken under Rule 205 and exhibits marked at those examinations. The originals were filed with the Clerk of the Bankruptcy Court under seal until the Frigitemp estate was closed, at which time they were to be destroyed.

A grand jury is currently investigating the claimed diversion of $5 million from Frigitemp through bribery, alleged kickbacks, embezzlement and fraudulent misappropriation by means of fictitious invoices and contracts. Appellant Davis is a target of this investigation. In early 1982 grand jury subpoenas duces tecum (which are the subject of this appeal) were issued to Davis and IDT requiring production of the corporate documents discussed above. A similar subpoena was issued to General Dynamics calling for the production of a variety of documents, including the transcript of Veliotis' testimony taken

at the Rule 205 examination. The government also moved the Bankruptcy Court for an order permitting it access to the materials under seal.[3] General Dynamics has turned over all the requested records in its possession except the Veliotis transcript. Davis has produced some but not all of the records subpoenaed from him and IDT.

Veliotis was permitted to intervene in order to argue against production of his testimony. On appeal he asserts that General Dynamics need not turn over to the grand jury the transcript of his Rule 205 testimony because he relied on the understanding of confidentiality described above before agreeing to testify. Davis and IDT contend that the terms to the protective order of June 1980 shield them from any obligation to

---

3. The government does not seek production of Davis' testimony which was given under a statutory grant of immunity.

produce the subpoenaed corporate documents; they also urge that the settlement agreement and consequent sealing by the Bankruptcy Court forecloses access by the United States Attorney and the grand jury to those sealed documents in the Clerk's custody.

II.

In pressing their arguments before us appellants rely heavily on our decision in Martindell v. International Telephone and Telegraph Corp., 594 F.2d 291 (2d Cir. 1979) (Mansfield, J.). In Martindell we were faced with the government's formal and informal attempts to secure evidence covered by a Federal Rule of Civil Procedure 26(c) protective order issued in a civil suit to which it was not a party. In our analysis we stated that the function of a Rule 26(c) protective order is to "secure the just, speedy and inexpensive determination" of

civil disputes. We also noted the policy consideration that encouragement of full disclosure of all relevant evidence is a key objective in the true administration of justice. The court recognized that without enforcement of a Rule 26(c) protective order witnesses might frequently refuse to testify if the government, in disregard of the order, could use the witnesses' testimony for criminal investigatory purposes. Id. at 295-96.

Regarding the government's efforts to obtain the information in Martindell by means of a telephone call and letter to the court, we held that the government's power to investigate, including use of the grand jury process, cannot be enhanced by such attempts to circumvent a protective order issued in a civil suit. We thus rejected the government's informal attempt to insinuate itself into private litigation.

The government, after being granted the status of a permissive intervenor, formally sought modification of the protective order to allow it access to certain deposition testimony. Since the deposed witnesses in Martindell had testified in reliance on confidentiality guaranteed by a formal protective order, the government's motion for modification was denied. The court reasoned that the government had failed to show the element of extraordinary need necessary to obtain modification of a protective order because it still had available its usual arsenal of investigatory weapons, including use of the grand jury process. Specifically reserved was the issue of whether the government might be entitled to enforcement of a subpoena compelling production of civilly protected depositions. See Martindell, 594 F.2d at 296 n.6.

Ranged against these considerations are the reasons for permitting the grand jury broad subpoena power in a criminal investigation. The awesome power of the government to use the inquisitional function of the grand jury in the compulsion of witnesses' attendance before it has recognized since our country's founding. Blair v. United States, 250 U.S. 273, 280 (1919). The grand jury's authority to subpoena witnesses because "the public . . . has a right to every man's evidence" is essential to its task. Branzburg v. Hayes, 408 U.S. 665, 688 (1972). A grand jury has wide ranging authority to inquire into suspected violations of the criminal law; and to effectuate such investigations it may compel the production of documentary evidence or the testimony of witnesses, as it deems necessary. See United States v. Calandra, 414 U.S. 338, 343 (1974). While the power to summon and

the correlative duty of the person summoned to appear is subject to some exceptions, see Branzburg, 408 U.S. at 688, e.g., a Fifth Amendment claim of self-incrimination, the scope of a grand jury's power to investigate is not narrowly limited, see Blair, 250 U.S. at 282. Wide latitude in gathering evidence is vital to the grand jury's investigative function. Every piece of information bearing on the investigation has importance in the deliberations since the nature of the crime and the identity of the accused are decisions made by the grand jury at the conclusion of its inquiry, not at the beginning. See Id. at 282.

The conflict between protection of private material used in a civil proceeding and public need in a criminal prosecution initially posed is easily resolved in this case. Absent applicable grounds for exception, such as a

previously asserted Fifth Amendment privilege, no shield protects the civil evidence here from compellable production before the grand jury which subpoenaed it.

III.

Veliotis' reliance on Martindell is misplaced because his situation is entirely different from that presented in our prior decision. A brief review of the manner in which the "understanding of confidentiality" was reached in this case demonstrates this. On the morning of February 19, 1980, prior to the examination of Veliotis, counsel for General Dynamics requested of Judge Lavien that "the papers in this proceeding," particularly an affidavit and memorandum filed by the trustee and the transcript of the instant discussion, be placed under seal because of "allegations that have been made about individuals at General Dynam-

ics" which were "inappropriate and scandalous." The trustee's attorney consented, except that he wanted the documents to be available "to the Courts." Judge Lavien suggested that the lawyers draw up a stipulation. Later that day General Dynamics counsel requested that any documents supplied be maintained "on a confidential basis" and "under a stipulation of confidentiality" because they included "confidential business information." The court responded that this was not customary and that the record in this case was not such as would require that everything be sealed. Judge Lavien then instructed counsel for General Dynamics that anything produced which counsel thought contained any "proprietary or confidential business information" should be so labeled and, absent disagreement from the opposition, would not be "made available for public dissemination." Significantly, no stipula-

tion of confidentiality was ever reduced to writing, no formal protective order was ever issued by Judge Lavien, and no documents or testimony were ever designated as containing proprietary or confidential business information.

Thus, while Martindell involved a formal protective order issued under Rule 26(c), here there was simply an "understanding of confidentiality." Further, the government in Martindell was proceeding outside of its usual investigative powers to secure the requested testimony, not by grand jury subpoena.

Finally and most crucially, there is no indication that Veliotis agreed to testify only in reliance on the "understanding." He has not shown us any evidence that he ever designated any of his testimony as containing confidential information, as required by the "understanding." He now claims that the un-

derstanding extended beyond that reached in court, due to an alleged out-of-court agreement between counsel. But a court cannot be expected to enforce an agreement of this nature which was never placed before it for approval and which has not even been reduced to writing. Were Veliotis truly concerned about his Fifth Amendment privilege, he would have insisted on something more than an out-of-court discussion or the very limited "understanding" outlined by Judge Lavien, before he agreed to testify. He could, for instance, have asserted his Fifth Amendment privilege at the time. Cf. Garner v. United States, 424 U.S. 648, 653-56 (1976) (under certain circumstances, failure to claim a Fifth Amendment privilege constitutes waiver of the privilege). His argument that he did not believe it necessary to claim the constitutional privilege because of his reliance on the "understanding" is

undercut by the fact that he apparently never availed himself of the protection afforded him. He has not shown that he in any way indicated which portions of his testimony were confidential and thereby included within the coverage of the understanding. Consequently, his argument that his Rule 205 testimony is "arguably" self-incriminating is now ineffectual.

IV.

We next consider the claims of Davis and IDT. As for the copies of the requested documents sought directly from Davis and IDT, paragraph 9 of the protective order, relied on by appellants to resist compliance, itself permits dissemination of these papers to anyone, i.e., to the grand jury.

As for those copies under seal in the Bankruptcy Court, access to sealed court records is ordinarily obtained by

a request addressed to the discretion of the trial court which determines the question in light of the relevant circumstances, cf. Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978) (upheld district court's denial of access by third party to former President's tapes used in previous court proceedings). In view of the fact that paragraph 9 of the protective order specifically permitted IDT to disclose "to any person or entity" information contained in the same corporate documents sought from the court, modification of the sealing order was well within the lower courts' discretion. Moreover, these records existed prior to the advent of the litigation and before the settlement agreement, which also contains a sealing provision, was entered into. As such they were previously subject to subpoena and cannot now be protected from grand jury review simply

because the parties to the agreement saw fit in their own private interests not to reveal this corporate material to the public. A court may direct access to such material upon a proper showing of need. Here such a showing was amply demonstrated. To have refused access to these records in the face of a subpoena from a grand jury would have been an abuse of discretion. Cf. Ex parte Uppercu, 239 U.S. 435 (1915) (Holmes, J.) (mandamus lies to compel a judge to unseal documents shown to be material and necessary in litigation, absent a demonstrated privilege).[4]

The orders are affirmed.

---

4. An estoppel argument raised by Davis and IDT is without merit.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and eighty-three.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE C. DAVIS, IDT CORP., and GENERAL DYNAMICS,

Defendants,

GEORGE C. DAVIS and IDT CORP., Nos. 82-5043, 82-5041

Defendants-Appellants,

and

P. TAKIS VELIOTIS,

Intervenor-Appellant

----------x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the intervenor-appellant, P. Takis Veliotis,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by
/s/ Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FRIGITEMP CORP., Bankrupt.	:	78 B 468 (JL)
GEORGE C. DAVIS and IDT CORP., Appellants, -against- UNITED STATES OF AMERICA, Appellee.	:	82 Civ. 6945 (VLB) ORDER
P. TAKIS VELIOTIS, Intervenor-Appellant, -against- UNITED STATES OF AMERICA, Appellee.	:	82 Civ. 7002 (VLB)

VINCENT L. BRODERICK, U.S.D.J.

George G. Davis, Intersystems Design and Technology Corporation ("IDT"), and intervenor P. Takis Veliotis have

appealed from an order of Bankruptcy Judge Joel Lewittes

1) which held that enforcement of grand jury subpoenas duces tecum issued to Mr. Davis, ITD and General Dynamics Corporation was not barred by protective orders nor by a settlement agreement dated April 29, 1981; and

2) which directed the Clerk of the Bankruptcy Court to permit access by the United States Attorney, for transmittal to the grand jury, to certain materials sealed and deposited with the Clerk pursuant to a settlement agreement; and

3) which denied an application by General Dynamics Corporation to modify the settlement agreement.

Judge Lewittes' order is affirmed.

SO ORDERED.

/s/ Vincent L. Broderick
Vincent L. Broderick,
U.S.D.J.

Dated: New York, New York
November 12, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In Re : 78 B 468

FRIGITEMP CORP., : ORDER

Bankrupt. :

----------x

VINCENT L. BRODERICK, U.S.D.J.

I have today affirmed Bankruptcy Lewittes' order September 29, 1982.

General Dynamics Corporation is directed, in accordance with that portion of Judge Lewittes' order which finds that enforcement of subpoenas issued to, inter alia, General Dynamics Corporation is not barred by any protective orders previously entered in this matter, to comply with the grand jury subpoena heretofore served upon it and to deliver to the United States Attorney, for transmittal to the grand jury, within two weeks of the date of this order, those documents called for in the

grand jury subpoena, including the deposition of P. Takis Veliotis.

SO ORDERED.

/s/ Vincent L. Broderick
Vincent L. Broderick
U.S.D.J.

Dated: New York, New York
November 12, 1982

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

In Re :

FRIGITEMP CORP., : SEALED ORDER

Bankrupt. : 78 B 468

- - - - - - - - - - - - - - - - - x

Upon consideration of the applications of the United States and of General Dynamics Corporation, and in accordance with the Court's oral decision read into the record on September 21, 1982, the court finds that enforcement of Grand Jury subpoenas duces tecum issued to George G. Davis ("Davis") Intersystems Design and Technology Corporation, ("IDT"), and General Dynamics Corporation, is not barred by any protective orders previously entered in this matter, nor by the Settlement Agreement between the Trustee of Frigitemp Corp., IDT and Davis, filed on April 29, 1981 ("the

Settlement Agreement"); and it is further

ORDERED that the Clerk of this Court is directed to permit access by the United States Attorney, for transmittal to the Grand Jury, to the materials sealed and deposited with the Clerk pursuant to the terms of the Settlement Agreement; provided, that the United States Attorney shall make appropriate arrangement to prevent the disclosure to the Grand Jury or to any Government personnel assigned to the criminal investigation of this matter, of the Rule 205 examination of George G. Davis, previously sealed by order of this court dated September 5, 1980, as well as any testimony, documents or other investigative leads or fruits derived therefrom; and it is further

ORDERED, that the application of General Dynamics Corporation for modification of the Settlement Agreement to

include xerographic or carbon copies of Rule 205 examination transcripts and materials held by General Dynamics or its personnel is hereby denied; and it is further

ORDERED, that this order and all proceedings and documents filed herein shall remain sealed and disclosed to no persons other than the parties and such of their attorneys as may be necessary to the execution of this Order, until further order of the Court.

Dated: New York, New York
September 29, 1982

SO ORDERED:

JOEL LEWITTES
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

- - - - - - - - - - - - - - -x

In the Matter :

of : No. 78 B 468

FRIGITEMP CORPORATION, :

Bankrupt. :

- - - - - - - - - - - - - - -x

United States Court House
Foley Square, New York, N.Y.
September 21, 1982
1:00 o'clock p.m.

DECISION BY HON. JOEL LEWITTES
IN CONTESTED MATTER RE: GENERAL
DYNAMICS, GEORGE DAVIS AND IDT

Before:

HON. JOEL LEWITTES,

Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 202)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S:

WILLIAM TENDY, ESQ.
Acting United States Attorney
For the Southern District of New York
1 St. Andrews Plaza
New York, New York

BY:
DAVID DENTON, ESQ.
Assistant United States Attorney
-and-
SETH TAUBE, ESQ.
Assistant United States Attorney

GELBERG & ABRAHMS, ESQS.
Special Counsel for Lawson Bernstein, Trustee of Frigitemp Corporation
711 Third Avenue
New York, New York

BY:
STEVEN M. SCHATZ, ESQ., Of Counsel

FOLEY, HOAG & ELIOT, ESQS.
Attorneys for General Dynamics
1 P.O. Square
Boston, Massachusetts 02109

BY:
WILLIAM L. GARDNER, ESQ., Of Counsel

HOLLMAN AND BYRNE, ESQS.
Attorneys for George Davis
27 East 39th Street
New York, New York 10106

BY:
MATTHEW L. BYRNE, ESQ., Of Counsel
-and-
DANIEL HOLLMAN, ESQ., Of Counsel

- - - - -

THE COURT: The Government, by the United States Attorney, brought this matter for resolution to this Court by way of an order to show cause in accordance with the provisions of Bankruptcy Rule 914 relating to contested matters, and the Government moved this Court for an order permitting access and presentation to the Grand Jury of certain documents that have been sealed and deposited with the Clerk of the Bankruptcy Court.

These documents were sealed pursuant to a settlement agreement and a protective order, which I will discuss further on this oral opinion.

Additionally, at the hearing on the Government's order to show cause the United States Attorney requested this Court to authorize the production by General Dynamics Corporation pursuant to a Grand Jury subpoena duces tecum issued to that corporation of any deposition transcripts and documents obtained by

Frigitemp Corporation's Trustee in bankruptcy in connection with certain Bankruptcy Rule 205 examinations of General Dynamics conducted by the Trustee.

In particular, the Government by this contested matter seeks the following documents:

Number one, it seeks documents from Intersystems Design And Technology Corporation, which will be referred hereinafter as IDT, and/or George Davis sought directly from them by the Grand Jury subpoena;

2. The Government seeks from General Dynamics documents and transcripts of Bankruptcy Rule 205 examinations of General Dynamics' employees sought directly from General Dynamics by the Grand Jury subpoena; and, finally, the Government seeks

3. Certain documents in the Trustee's files required by the Grand Jury subpoena other than those sought from Davis, IDT or General Dynamics.

These documents presently are under seal pursuant to the settlement agreement.

It appears that by order of this Court, dated January 23, 1980, the Trustee was granted the right to commence certain investigations into the acts, conduct and property of the now bankrupt, Frigitemp Corporation.

Thereafter, on February 5th of 1980 the Court permitted the Trustee to undertake Bankruptcy Rule 205 examinations of General Dynamics Corporation in furtherance of that investigation.

Since General Dynamics is situated beyond the territorial effect of a subpoena issued for the Rule 205 examination -- and the territorial effect of 205 subpoenas is coincident with Rule 45 of the Federal Rules -- the Trustee filed in the Bankruptcy Court of Massachusetts an application for ancillary examinations. And, ancillary jurisdiction is conferred by former Bankruptcy Act Section 2a(20) and, of course, we are

dealing with the Bankruptcy Act of 1898 since this matter was filed in the Court prior to the effective date of the Bankruptcy Reform Act of 1898.

It is clear that Section 2a of the former Bankruptcy Act permits an ancillary Court to make orders "for the examination of witnesses concerning the acts, conduct or property of the bankrupt in and of the bankruptcy proceedings."

Thereafter, the Massachusetts Bankruptcy Court issued subpoenas duces tecum to General Dynamics and several of its officials and employees. Following an objection to the subpoenas and a request for a protective order by the subpoenaed parties, an "understanding of confidentiality" was reached during the course of a series of hearings before Massachusetts Bankruptcy Judge Lavien.

Thereafter, the Trustee did, in fact, proceed with the 205 examinations of the subpoenaed parties. In May, 1980, pursuant to an order of this

Court, the Trustee was authorized to undertake another Rule 205 examination, this time of IDT, and on July 12, 1980 a protective order was issued by this Court which sealed all documents and information transmitted to the Trustee at the aforesaid Rule 205 examinations designated as confidential by IDT, that is, the documents and information so designated.

In April, 1981 this Court, after a hearing, granted an order approving a settlement agreement among the Trustee, one George G. Davis and IDT, dated April 14, 1981, wherein in exchange for one million four hundred thousand dollars paid to the Trustee on behalf of the bankrupt estate, the Trustee agreed to settle its alleged claim against Davis, IDT and certain named releasees. As set forth in the settlement agreement, that list of releasees includes General Dynamics Corporation, and IDT,

as well as persons deposed at the Rule 205 examinations of each of those corporations.

In accordance with the terms of the settlement agreement the Trustee was required to turn over to IDT all copies of transcripts of the Rule 205 examinations of any of the releasees and all documents provided at or in connection with such examinations. Additionally, the original transcripts and documents were to be kept by the Clerk of this Court under seal and to be destroyed upon the closing of the Frigitemp estate.

It should be noted that prior to the instant application Equitable Life Assurance Society of the United States, not a party to these settlement agreements, unsuccessfully sought in this Court modification of the protective order provisions of that agreement, and that case has been reported at 15 Bankruptcy Reports, page 283.

Finally, with respect to the settlement agreement, it should be indicated that notice of the Trustee's application for an order approving the settlement agreement was made upon the bankrupt's creditors committee, The District Director of Internal Revenue and the United States Attorney for the Southern District of New York. No objection to the settlement agreement was entered by any of the parties or by any of the persons or entities given notice of the Trustee's application.

With respect to the contentions of the parties, I will first examine those contentions raised by IDT and George Davis. IDT and George Davis assert that the documents sought from them here by the Government were covered by the July 12, 1980 protective order and the April 14, 1980 settlement agreement approved by this Court. Their resistance in the main is grounded upon the general policy that protective orders and Court-approved settlement agreements

ought to be observed and enforced particularly, where as here the parties have relied upon their enforceability.

And, to a great extent, both IDT and George Davis relied upon a decision by the Second Circuit Court of Appeals in Martindell v. International Telephone & Telegraph Corporation, 594 F. Sec., 291, specifically at page 296, and that case was decided by the Second Circuit in 1979.

Moreover, both IDT and Davis assert that the Government's delay in seeking the instant documentation in connection with the latter's ongoing investigation of Frigitemp or with the Trustee's investigation of Frigitemp, as well as the Government's failure to object to the Court's approval of the settlement agreement, forecloses the Government on the bases of laches and estoppel from now obtaining the relief requested by the Government here.

General Dynamics has refused to produce documents of the Massachusetts 205 examinations taken of it and its personnel as well as the documents delivered to the Trustee in connection with those examinations. It appears that General Dynamics has turned over some documents to the Government in accordance with a Grand Jury subpoena. General Dynamics resists the Government's motion here on the ground that the transcripts and the documents are subject to that understanding of confidentiality, referred to earlier, reached in the Massachusetts Bankruptcy Court and, accordingly, may not be disclosed to third parties.

Furthermore, General Dynamics maintains that this Court's order approving the settlement agreement should be deemed to insulate it from the Government's instant application with respect to copies of those depositions and documents held by General Dynamics or its personnel. In the event, says General Dynam-

ics, that this Court does not interpret the order approving the settlement agreement to afford General Dynamics that protection we are requested by General Dynamics to modify that order to expressly require that those copies held by General Dynamics are protected by the umbrella of confidentiality.

The Government, of course, recognizes, when appropriate, the utility of protective orders between private parties. But such orders, it argues, may be modified particularly where, as here, the public interest, that is, the Grand Jury, requires full disclosure.

Moreover, since the protective orders and the settlement agreement deny disclosure by the Trustee, the Government maintains it can obtain the bulk of the material sought by it from IDT, Davis and General Dynamics without modifying the order and agreement.

Accordingly, any other documents required from the Trustee would amount to a minimal modification. Finally, the

Government argues that it is not barred under the doctrines of laches and estoppel from the relies it requests here.

In objecting to the Government's right to the requested documents -- and I am now turning my direction and attention to the IDT and Davis argument objecting to the Government's right to the requested documents -- Davis and IDT, as I indicated earlier, relied chiefly on the Court of Appeals decision in Martindell.

As we probably all recall, in Martindell the Trial Court ruled upon an informal request by the Government for access to deposition transcripts sealed by a protective order. Before deciding whether to grant such access the Second Circuit Court of Appeals set forth the conflicting factors to be weighed in reaching such determination.

On the other hand, it observed it was the expressed objective of protective orders to secure a speedy and inexpensive determination in civil conflicts

by encouraging full disclosure of all evidence that might have any relevance to the litigation. This objective would be seriously undermined if witnesses who rely on protective orders cannot be certain of their enforceability.

Against this objective, said the Court, must be weighed the public interest in obtaining evidence necessary for efficient law enforcement. The Court in Martindell found that the latter interest was minimized when the Government was the party requesting access. It held that it would be improper to supplement the "awesome investigative powers" of the Government by granting it access to sealed documents on the basis of an informal request where the deposed parties had forborne their Fifth Amendment right to refuse to testify in specific reliance upon the protective order.

We find for several reasons that the underlying rationale of the Martindell decision to be distinguishable from the Government's present request for access to IDT documents.

In Martindell the Government sought access to transcripts of depositions taken pursuant to a protective order. The basis for the Martindell decision and the clear reliance by the deposed parties on an express provision in the protective order which prohibited disclosure of their testimony for purposes of law enforcement. As Judge Carter noted in a memorandum endorsement, which is unreported, I believe, of his decision in Carter-Wallace v. Hartz Mountain Industries, Inc., Judge Carter stated as follows:

"Martindell, because the Government was the purported intervenor, involved Fifth Amendment rights. The Second Circuit feared that witnesses would not testify in reliance on a protective order if their testimony were to be made

available to the Government for criminal investigatory purposes in disregard of those orders. Absent the special reliance on confidentiality manifested by the Martindell deponents, there is no reason to prevent third party access to transcripts relevant to a subsequent action, especially where a substantial savings of time and money are achieved thereby."

Here, at least with respect to Davis and IDT, the Government is merely seeking to obtain documents which preexisted both the settlement agreement and the protective order. "The" -- and I am quoting from Martindell -- "The reliance of a private party upon protection of pre-existing documents from disclosure to the Government would normally be more difficult to justify then that of a witness who would, absent the protective order, have invoked his privilege and given no testimony at all."

Where, as here, the documents being sought by the Government are corporate books and records, such reliance is more difficult to justify in view of the generally accepted rule that an officer of a corporation may not claim that the privilege against self-incrimination would justify refusal to produce corporate documents sought by Grand Jury subpoenas duces tecum directed to either the corporation or the individual corporate officer.

Of course, because this is an oral decision I am not going to cite everything. I must note that the last proposition is butressed by a decision of the Supreme Court in Wilson v. The United States at 221, U.S. 361, and Dreier v. United States, 221, U.S. 394. And, see, also, Bellis v. United States, 417, U.S.85.

Furthermore, Martindell dealt with an informal Government request which the Court found to be an attempt to improperly supplement the Government's "awe-

some investigative powers." Here the request for access was made pursuant to the Government's use of its express investigative power -- a Grand Jury subpoena.

The Court in Martindell noted that it was not called upon to decide whether the Government might be entitled to enforcement of the subpoena compelling production of the deposition. The Martindell panel further noted that its decision in the case is consistent with United States v. GAF Corporation which recognizes, as do we, that in an appropriate case the District Court may upon a proper showing in the exercise of its discretion grant an application by the Government pursuant to its statutory enforcement power for modification of a protective order entered in civil litigation between others to permit inspection of documents covered by the order.

Applying the Martindell balancing approach, we would be compelled to strongly consider the policy of giving

broad investigative powers to a Grand Jury in order not to frustrate its investigation. We need not decide here whether such interest would weigh heavily enough in favor of disclosure even where there exists a special type of reliance on confidentiality that was present in Martindell. Nevertheless, in the instant matter, at least with respect to Davis and IDT, that type of special reliance is not present.

The pre-exisiting documents sought by them are not subject to a Fifth Amendment privilege. Accordingly, Davis and IDT cannot claim to have surrendered any privilege when they produced the documents upon their alleged reliance that they would not be turned over to the Government. This analysis disposes of the claim that Davis and IDT acted in reliance on the settlement agreement as well as on the protective order.

But, perhaps the most compelling distinction between the contested matter here and Martindell is the fact that the

Government is seeking the documents from the parties who produced them under the protective order but which were not bound by that order. While the protective order clearly prohibited the Trustee from disclosing the sealed documents, it placed no such express restriction on IDT or Davis.

To paraphrase Judge Carter in Carter-Wallace, the subpoenas to IDT and Davis are directed to parties who originally had control of the evidence and who are not bound by the sealing provisions of either the protective order or the settlement agreement which, by their own terms, prohibited disclosure by the receiving party, that is, the Trustee. None of the cases cited by any party support the tenet that a party can avoid a subpoena merely because it disclosed the same material to an adversary bound by a protective order.

I turn now to General Dynamics. The Grand Jury subpoena issued to General Dynamics seeks not only documents submitted in connection with the Rule 205 examinations held pursuant to order of the ancillary Bankruptcy Court in Massachusetts; it requires, as well, the production by General Dynamics of transcripts of the Rule 205 depositions. To the extent that such subpoena encompasses disclosure of a witness' testimony, General Dynamics' reliance upon Martindell facially is more appealing than the unsuccessful dependence of IDT and Davis upon that decision.

As noted earlier, the Martindell panel denied the Government's informal request for "the deposition testimony of witnesses on a matter delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination, which claim of privilege was foregone on an explicit agreement between the parties sanctioned by a protective order for limited use of that

testimony," citing United States v. GAF Corporation on the petition for rehearing found in volume 596, Fed. Sec., page 18, Second Circuit 1979.

Of course, the first proposition that invites inquiry is whether the Rule 205 testimony of General Dynamics' witnesses encompassed matters "delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination."

The record before Judge Lavien in connection with the so-called "understanding of confidentiality" entered into between the Trustee and General Dynamics simply reveals General Dynamics' concern over the dissemination by the Trustee to third parties of "allegations (in the affidavit of Trustee's counsel and the Trustee's memorandum of law) that have been made about individuals of General Dynamics" -- that is found at page 36 of the transcript of hearing before Judge Lavien on February 18, 1980 -- as well as "assertions (therein) of

certain 'business crimes'" -- also at the transcript of hearing but at page 47 thereof.

It appears, as well, that the "understanding of confidentiality" was entered into with respect to corporate documents of General Dynamics which, presumably, contained confidential business and proprietary material. Thus, the "understanding of confidentiality" here was devised and designed to cloak certain ex cathedra statements by the Trustee concerning the business integrity of General Dynamics,not to insulate the deposition testimony of witnesses.

Moreover, even assuming arguendo General Dynamics' contention that the deposed witnesses here testified upon the reliance of the "understand of confidentiality" thus foregoing their assertion of their Fifth Amendment privileges, no claim or intimation by any deposed witness has been interposed indicating that any such testimony arguably was self-incriminating.

Even more devastating to General Dynamics' argument in this regard is that even if the deposed witnesses could properly claim a Fifth Amendment privilege, General Dynamics has no standing to assert that privilege on behalf of its employees, citing Flavorland Industries, Inc. v. United States, 591 F.Sec. 524, page 525, a Ninth Circuit determination in 1979.

Finally, and additionally, quite critical to our conclusion that General Dynamics has failed to sufficiently color match the facts here with those in Martindell is that the depositions and documents are being sought from general Dynamics, a party not bound by the "understanding of confidentiality." The transcript of the hearing before Bankruptcy Judge Lavien in Massachusetts reveals that General Dynamics was concerned only with the dissemination by the Trustee to the general public of confidential business material.

Accordingly, the Bankruptcy Judge instructed Trustee's counsel not to disclose materials and information designated as confidential. No where in the record is it suggested that General Dynamics was restrained or restricted in any manner with respect to disclosure of materials within the"understanding of confidentiality."

So, if General Dynamics was not bound itself by the "understanding of confidentiality" and is not a party to the settlement agreement, since the terms of the settlement agreement entered into between and among IDT, Davis and the Trustee with respect to documents and other confidential information expressly limited its protective provisions to the originals of such materials in the Trustee's possession, and not copies thereof in IDT's possession, we decline the non-party General Dynamics' invitation to modify the agreement to protect copies of the General Dynamics' deposition transcripts.

Accordingly, the balancing approach as applied to the facts of the instant matter, unlike the result in Martindell, favors the public interest in obtaining all relevant evidence required by the Grand Jury subpoena issued to General Dynamics.

Having found that the protective order and the settlement agreement did not prevent enforcement of the Grand Jury subpoenas issued to Davis, IDT and General Dynamics, we now turn to the group of materials sought directly from the Trustee. These include documents received by the Trustee in his investigation of various parties other than General Dynamics, IDT and their personnel. As such, those documents are covered by the sealing provisions of the settlement agreement but neither Davis nor IDT can assert any pre-existing interest with regard to those materials. The Grand Jury needs information relevant to the investigation and, in my view, utilizing the balancing approach

again clearly mandates enforcement of those materials in the hands of the Trustee.

Somewhat more complicated is the argument by Davis that the doctrine of equitable estoppel bars enforcement of any of the subpoenas. Until recently, it was well established that estoppel could not be invoked against the Government. I am not going to give the citations; that I will save for whatever is left or forever what happens to be saved -- not very much.

The Supreme Court in recent years has indicated that under certain circumstances the Government might be subject to the dictates of that doctrine. However, the Court did not indicate what that type of conduct by a Government employee would acceptably give rise to the application of estoppel and, indeed, has restrained from deciding whether even affirmative misconduct would estop the Government.

Although the Ninth Circuit has shown a willingness to permit estoppel to be asserted against the Government in certain circumstances -- and I have cited such decision emminating from the Ninth Circuit -- the Second Circuit has generally declined to follow that course and was recently reversed when it invoked such an estoppel in Hansen v. Harris. That case is 619 Fed. Sec., 942, and it was reversed sub nom in Schweiker v. Hansen, 450 U.S., 785 in a per curiam decision in 1981.

Lacking conclusive guidance on the question, and I now quote, "we avoid that bramblebush by assuming the application of the doctrine of estoppel if the facts warrant it," citing Precious Metals Association v. Commodity Futures Trading Commission, 620 F. Sec. 900 at page 909, a First Circuit decision in 1980.

Generally, a claim of equitable estoppel is available upon a showing of the following four elements:

1. The party to be estopped must know the facts;

2. He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3. The latter must be ignorant of the true facts; and

4. He must rely on the former's conduct to his injury.

Those elements are found in numerous cases. I will just cite a Southern District case -- Rosenthal v. National Life Insurance Company, 486 Fed. Sup., 1018 at page 1023, a 1980 decision emminating from this District.

In support of his claim of estoppel, Davis asserts that based on the Government's continued interest in the Frigitemp case it knew all the facts. Further, he asserts, the United States Attorney's Office was given notice of the settlement agreement before it was

approved by the Court and as such the Government knew of the sealing provision contained therein.

With respect to the Government's conduct, Davis asserts that the Government's failure to object to the sealing provision contained in the settlement agreement amounted to an acceptance thereof on which Davis had a right to rely.

As to element three -- and I refer you to the four elements that I just mentioned now -- it must be ignorant of the true facts. Davis claims that when the Government accepted the sealing provisions it intended to issue the instant subpoenas and overturn the sealing provisions. Finally, Davis alleges detrimental reliance in that he paid one million four hundred thousand dollars for provisions in the settlement agreement which the Government is now attempting to overturn.

The Assistant United States Attorney seeking enforcement of the subpoenas argues that he did not have knowledge of all the facts. He claims that only the Civil Division of the United States Attorney's Office received notice of the settlement agreement and that notice of settlement did not even mention the sealing provision; that by its silence the Government did not disclaim any interest in the sealed documents; and that the decision to issue the subpoenas was based on facts that had only recently come to the Government's attention.

The record before us is insufficient to support a determination of whether the Government had knowledge of the sealing provisions or whether at the time the settlement agreement was approved the Government intended to issue the subpoenas. For the purposes of resolving the issue at hand, we will assume the existence of the first and third elements necessary to demonstrate equitable estoppel.

Our attention is, thus, focused on the conduct of the Government which, allegedly, gave rise to the claim of estoppel, i.e., its failure to object to the settlement agreement. I now quote from a decision in the Southern District of New York entitled Redington v. Hartford Accident & Indemnity Company, 483 F. Sup.83, at page 86, and the quotation is as follows:

"It is well settled that the sine qua non of an estoppel is some inequitable or fraudulent conduct engaged in by the party sought to be estopped which is reasonably relied upon by the other party to his detriment."

Mere silence or failure to respond does not amount to estoppel conduct. That is the Precious Metal Association case I cited earlier.

For a party to be estopped on the basis of its silence it must have "a duty to speak." In the instant case the Government was not a party to the set-

tlement agreement. It, therefore, had no "duty to speak" and no obligation to voice any objections.

Thus, Davis has failed to demonstrate such conduct on the part of the Government that would give rise to a claim of estoppel. Separate and distinct from the claim of estoppel is Davis' argument that the doctrine of laches bars the Government from seeking any of the subpoenaed materials. In support of this claim Davis asserts that the Government's four-year delay in seeking the subpoenaed materials is inexcusable and has resulted in prejudice to Davis.

It is well established, says a Supreme Court decision -- not I, necessarily -- but, it is well established that "the United States is not subject to the defense of laches in enforcing its rights."

That case is United States against Summerlin, 310, U.S., 414 at page 416, a 1940 decision. There are several other

cases cited. We note that even if the Government was not immune to a claim of laches, the facts here do not support invocation of the doctrine. Firstly, Davis, has failed to demonstrate that in delaying to seek the subpoenaed material the Government was negligent in pursuing its criminal investigation of Frigitemp.

Although the record before us is insufficient for us to support a determination of whether the delay is, in fact, inexcusable, we doubt whether it is appropriate for a private party to tell the Government at what pace it should pursue an investigation.

More importantly, however, Davis has failed to establish the type of prejudice that would support a claim of laches the fact that Davis paid one million four hundred thousand dollars for the settlement agreement and the sealing provisions contained therein was not a result of the Government's delay in seeking the materials. See, for ex-

ample, Emle Industries, Inc. v. Patendex, 478 F. Sec.562 at page 574, a Second Circuit 1973 decision.

Therefore, finally and in conclusion, we hold that enforcement of the Grand Jury subpoenas issued to Davis, IDT and General Dynamics is not barred by either the protective order of the Massachusetts Bankruptcy Court or the settlement agreement approved by this Court. Further, we direct the Clerk of the Court to permit the Grand Jury access to the materials sought by the subpoena issued to the Trustee.

Finally, the application of General Dynamics for modification of the settlement agreement is in all respects denied. The Government is directed to settle an order on notice in conformity with the determination of this Court.

MR. DENTON: May I be heard briefly, Your Honor?

THE COURT: Yes.

MR. DENTON: Does Your Honor have any estimate when your written opinion would be ready and filed?

THE COURT: To use a term that I used in this opinion, the record is insufficient.

MR. DENTON: I raise that for this reason: we really do have two parts to this application and one is enforcement of the Grand Jury subpoenas which we intend to proceed with forthwith. To that end I will state for the record we would expect compliance with all of the withheld items by the close of business one week from today. Otherwise, we shall seek enforcement in the District Court.

With respect to the sealed items, I think that that can wait until your written opinion. One reason is that I believe compliance with the Grand Jury subpoenas may place the bulk of those materials and then we can determine what are those minimal items left.

THE COURT: I will tell you -- I don't know whether it has to be on the record or off the record -- the problem that has been plaguing me vis-a-vis getting the decision, this decision among other decisions, out and that is that my secretary's mother has been in extremis for several months. Why she is still alive is something that cannot be determined by medical authorities. The fact is she still is and my secretary is in and out of the office. Worst of all, if the inevitable occurs within the next few days, or so, that will necessitate the absence of my secretary.

So, I can't, and I think it is unfair to tell you it will be out in a week. There is no reason why it can't be out in two days under normal circumstances. That's my problem and that's what necessitated my calling all the parties. To some extent I have been living with this problem for several months.

I can tell you that I will move this ahead of all other decisions to be typed.

MR. DENTON: Very well. As I said, we can wait a period of time on those items for compliance with the subpoenas. As I previously indicated to Your Honor, we would like to devise a procedure that would insulate our criminal proceeding from the immunization testimony of Mr. Davis.

THE COURT: I should note although I intended to originally give a short summary of the decision from the Bench I have, in essence, given the decision from the Bench less several footnotes. In essence, this is it.

MR. DENTON: Very well.

THE COURT: I will, however, move with all deliberate speed.

MR. GARDNER: If I could say one thing. I wouldn't want our silence to be regarded as an assent to the compliance question. I think we have to have discussions.

MR. DENTON: The subpoena has been outstanding since February.

THE COURT: I don't know that I have to deal with this.

MR. DENTON: I have stated on the record the time frames within which we would intend to have compliance. Otherwise we will seek our remedies.

THE COURT: Very well. Gentlemen, thank you.

- - - - -